(1)

Supreme Court, U.S.
FILED
01-84 JUL 1 1 2001
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

Dana Edward Swab,

Petitioner,

v.

Commonwealth of Pennsylvania,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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39 pp

QUESTION PRESENTED

Whether trial counsel's failure to resist the government's repeated introduction into evidence, in its case-in-chief, of the Petitioner's parole status at the time of his arrest, which has been judicially recognized as an "impropriety," is prejudice under this Honorable Court's standard for ineffective assistance of counsel claims?

LIST OF PARTIES

Petitioner

Dana Edward Swab has no corporate affiliations.

Respondent

Commonwealth of Pennsylvania.

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Dana Edward Swab respectfully requests that this Honorable Court issue a writ of certiorari to review the judgment entered in this case by the Superior Court of Pennsylvania.

OPINIONS BELOW

By Order of the Pennsylvania Supreme Court, dated April 17, 2001, the Petitioner's *Petition for Allowance of Appeal* was denied. This Order is reproduced in Appendix A at 1a-2a.

On November 14, 2000 the Pennsylvania Superior Court, an intermediate appellate court, refused the Petitioner's *request for reargument or reconsideration*. This Order is reproduced in Appendix B at 3a-4a.

The Superior Court's unreported memorandum decision was issued on September 1, 2000 and is reproduced as Appendix C at 5a-10a.

The Venango County Court of Common Pleas, the trial court, *Opinion in Support of Order* is reproduced in Appendix D at 11a-15a. The sentence that the trial court imposed upon the Petitioner is reproduced in Appendix E at 16a-17a.

JURISDICTION

The Pennsylvania Superior Court issued an unreported memorandum opinion on September 1, 2000. A timely *request for reargument or reconsideration* was filed on September 15, 2000 and denied on November 14, 2000. The Pennsylvania Supreme Court, on April 14, 2001, denied the

Petitioner's *Petition for Allowance of Appeal*. This Honorable Court has jurisdiction under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution states:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI.

STATEMENT OF THE CASE

A. The Pennsylvania Trial Court – The Venango County Court of Common Pleas

In the Venango County Court of Common Pleas, sitting in Franklin, Pennsylvania, the Petitioner was tried before a jury on December 17, 1998 and convicted of violating 75 Pa. C.S.A. 3731 § (a) (1) -- driving under the influence. The Honorable H. William White, President Judge of Venango County, was the trial judge. The Petitioner was

sentenced on January 28, 1999 to, among other things, the pain of imprisonment for a period of "not less than **FOUR (4) MONTHS** and not more than **TWENTY-FOUR (24) MONTHS LESS ONE (1) DAY.**" (Emphasis in original) Appendix E at 16a-17a.

The Petitioner was represented by different counsel at trial (throughout this petition referred to as "trial counsel"). Following trial, but before being sentenced, the Petitioner retained current counsel of record. Current counsel of record was retained to review the record, once prepared, to determine what, if any, error had occurred at trial. Following the filing of the trial transcript, current counsel of record submitted a claim of ineffective assistance of counsel.

The claim is based upon the fact that trial counsel failed to object to repeated statements by government witnesses, on direct examination in the government's case-in-chief, that at the time of the Petitioner's arrest the Petitioner had a parole officer and therefore had committed prior bad acts.

This claim was raised before the trial court in a supplemental concise statement of matters complained of on appeal and answered by the trial court in an opinion in support of order, which is reproduced in Appendix D at 11a-15a.B.

B. The Pennsylvania Appellate Courts

The Petitioner timely filed an appeal to the Pennsylvania Superior Court. The Superior Court heard oral argument on July 7, 2000. The Superior Court issued a memorandum opinion on September 1, 2000, which is reproduced in Appendix C at 5a-10a.

Petitioner timely filed, on September 15, 2000, a *request for reargument or reconsideration* with the Pennsylvania Superior Court. That request was denied on November 14, 2001. Appendix B at 3a-4a. Petitioner next sought relief from the Pennsylvania Supreme Court. On April 17, 2001 the Pennsylvania Supreme Court denied the *Petition for Allowance of Appeal*. Appendix A at 1a-2a.

The Pennsylvania Superior Court dealt with the Petitioner's claim of trial counsel's ineffective assistance. The Superior Court conceded that an "apparent impropriety" had occurred, but asserted that trial counsel's error "would be deemed harmless." The Pennsylvania Superior Court wrote:

> "The Commonwealth has not argued that Appellant's criminal history falls into any of the delineated exceptions relating to other crime evidence. Therefore, we must find that Appellant's claim has merit. Despite the Commonwealth's claim that the evidence was introduced to explain the course of events relating to the refusal to submit to a blood test, the testimony could have been redacted so that reference to Appellant's parole status would not have been elicited.
>
> Furthermore, it is clear from the record that the admission of testimony pertaining to Appellant's request to speak to his parole officer was not a necessary part of the Commonwealth's case. Despite this apparent impropriety, any error in its admission would be deemed harmless." Appendix C at 8a.

C. The United States Supreme Court

Following the Pennsylvania Supreme Courts refusal to review the decision of the Pennsylvania Superior Court, this petition timely follows to this Honorable Court.

REASONS FOR GRANTING THE WRIT

The Pennsylvania state courts have denied the Petitioner his rights under the Sixth Amendment to the United States Constitution. The Petitioner has been tried, convicted and sentenced in a process where he was deprived "...Assistance of Counsel for his defence" as guaranteed by the Sixth Amendment. The process by which the Petitioner's conviction arose is so tainted by prejudice and so repugnant to the precedents of this Honorable Court as to compel the granting of this petition for writ of certiorari.

The Sixth Amendment to the United States Constitution guarantees that every criminal defendant is entitled to the assistance of counsel in presenting his or her defense. This Supreme Court has stated, "[T]he right to counsel is a fundamental right of criminal defendants; it assures the fairness, and the legitimacy, of our adversary process." *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986). Furthermore, this Supreme Court has recognized that "the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

This Supreme Court established the test for determining whether a defendant has received the effective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984). The Court stated that "[T]he benchmark for judging any claim of ineffectiveness must be whether

counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. The Strickland test has two components, both of which must be satisfied to establish that defense counsel's performance was ineffective. First, "the defendant must show that the counsel's performance was deficient." Id. at 687. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* To make the showing, the defendant must demonstrate "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

Despite subtle nuances in the jurisprudence of *Strickland*, this Honorable Court has recently reaffirmed the basic principle and elementary approach to be taken when deciding prejudice. In *Williams v. Taylor*, 529 U.S. 362, 392 (2000) this Honorable Court declared "Cases such as *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986), and *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), do not justify a departure from a straightforward application of *Strickland* when the ineffectiveness of counsel does deprive the defendant of a substantive or procedural right to which the law entitles him."(Footnote omitted)

Trial counsel's performance was deficient. Trial counsel failed to resist the government's repeated introduction, in its case-in-chief, of the fact that the Petitioner was on parole at the time of his arrest. Trial counsel's deficiency has already been judicially recognized.

The Pennsylvania Superior Court has conceded, "...it is clear from the record that the admission of testimony pertaining to Appellant's request to speak to his parole officer was not a necessary part of the Commonwealth's case." Appendix C at 8a. The Pennsylvania Superior Court even declares the error as an "apparent impropriety." Appendix C at 8a.

The Petitioner was denied the relief to which he is entitled, a new and fair trial, by the Pennsylvania Superior Court's erroneous conclusion that "...any error in its admission [the fact that Petitioner was on parole at the time of his arrest] would be deemed harmless." Appendix C at 8a.

Having, in-hand, the judicial recognition that the events that trial counsel failed to resist are an "apparent impropriety", the sole issue left to decide is whether the "apparent impropriety" was prejudicial.

The Petitioner must show that he was prejudiced by trial counsel's errors. This Supreme Court has stated, "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland* at 695. As to what a "reasonable probability" is, federal courts have defined a "reasonable probability" that results of trial would have been different as a probability sufficient to undermine confidence in the outcome. *Miles v. Dorsey*, 61 F. 3d 1459, 1474-1475 (10th Cir. 1995), certiorari denied 516 U.S. 1062.

In this case, the Petitioner was prejudiced and there exists a reasonable probability that the outcome would have been different sufficient to undermine confidence in the jury's verdict. The jury trial was a case of credibility. Repeatedly

the government's witnesses testified exactly opposite of the accused, who took the stand in his own defense.

The prejudice to an accused by the introduction into evidence of "other crimes, wrongs, or acts" is so universally accepted that its prohibition is a "black letter" rule of evidence. Both Federal Rule of Evidence 404 (b) and Pennsylvania Rule of Evidence 404 (b)(1) state in pertinent part "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."

The Pennsylvania Superior Court ignored the precedents and wisdom of their own Supreme Court when they declared the "impropriety" as "harmless". The Pennsylvania Supreme Court has stated "**Evidence of prior criminal activity ... is probably only equaled by a confession in its prejudicial impact upon a jury**." (Emphasis supplied) *Commonwealth v. Spruil*, 480 Pa. 601, 606, 391 A. 2d 1048,1050 (1978). The evidence that the Defendant was on parole at the time of his arrest shows prior criminal activity.

This Honorable Court has a long tradition of recognizing that "other crimes, wrongs, or acts" are an impermissible part of the government's case-in-chief. In *Old Chief v. United States*, 519 U.S. 172 (1997) this Honorable Court so eloquently stated the reasons for excluding such testimony and the unfair prejudice such evidence carries that it is incumbent upon Petitioner that that language be included in this petition. In *Old Chief* at 180-182 this Honorable Court declared:

> "The term "unfair prejudice," as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the

factfinder into declaring guilt on a ground different from proof specific to the offense charged. *See* generally 1 J. Weinstein, M. Berger, & J. McLaughlin, Weinstein's Evidence ¶ 403[03] (1996) (discussing the meaning of "unfair prejudice" under Rule 403). So, the Committee Notes to Rule 403 explain, " 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Advisory Committee's Notes on Fed. Rule Evid. 403, 28 U.S.C.App., p. 860.

Such improper grounds certainly include the one that Old Chief points to here: generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily). As then-Judge Breyer put it, "Although ... 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged--or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment--creates a prejudicial effect that outweighs ordinary relevance." *United States v. Moccia*, 681 F.2d 61, 63 (C.A.1 1982). Justice Jackson described how the law has handled this risk: "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to

establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, *Greer v. United States*, 245 U.S. 559, 38 S.Ct. 209, 62 L.Ed. 469, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." *Michelson v. United States*, 335 U.S. 469, 475-476, 69 S.Ct. 213, 218-219, 93 L.Ed. 168 (1948) (footnotes omitted).

Rule of Evidence 404(b) reflects this common-law tradition by addressing propensity reasoning directly: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Fed. Rule Evid. 404(b). There is, accordingly, no question that propensity would be an

> "improper basis" for conviction and that evidence of a prior conviction is subject to analysis under Rule 403 for relative probative value and for prejudicial risk of misuse as propensity evidence. Cf. 1 J. Strong, McCormick on Evidence 780 (4th ed.1992) (hereinafter McCormick) (Rule 403 prejudice may occur, for example, when "evidence of convictions for prior, unrelated crimes may lead a juror to think that since the defendant already has a criminal record, an erroneous conviction would not be quite as serious as would otherwise be the case")."

The guaranty that "... the whole matter of character, disposition and reputation" be closed from the "...prosecution's case-in-chief" admittedly was violated in the Petitioner's trial. The violation is most offensive as it was caused by trial counsel's failure to resists the "apparent impropriety" which took place at the Petitioner's trial.

The repeated admission of the Petitioner's parole status in the government's case-in-chief so violated the established rules of evidence, the precedents of the courts and the ancient traditions of the common-law that it is unimaginable that the Pennsylvania courts can declare such error as "deemed harmless."

The prejudice is so plain, palpable and repugnant to our law as to scream injustice. The fact that the Pennsylvania courts are deaf to these screams is certainly a handicap that cannot be attributed to this Honorable Court.

The Pennsylvania courts are unable to offer any sound explanation for denying the Petitioner relief. The Pennsylvania Superior Court only gives a cursory explanation for why such a blatant error would be "deemed harmless." The Pennsylvania Superior Court declares the error as harmless because

> "In this case, the testimony overwhelmingly reflected [Petitioner's] guilt of driving under the influence of alcohol. [Petitioner] himself admitted to the consumption of alcohol prior to his stop. Therefore, even after assigning error in counsel's failure to object to the admission of the portion of the officer's testimony pertaining to [Petitioner's] parole status, any error could not have contributed to the verdict. Therefore, counsel cannot be deemed ineffective." (Citations to transcript omitted) Appendix C at 9a.

In order to understand how faulty the Pennsylvania Superior Court's reasoning is, we must look at the language of 75 Pa. C.S.A. 3731 § (a) (1) -- driving under the influence. 75 Pa. C.S.A. 3731 § (a) (1) states:

> "§ 3731. Driving under influence of alcohol or controlled substance
>
> (a) Offense defined.--A person shall not drive, operate or be in actual physical control of the movement of a vehicle in any of the following circumstances:

> (1) While under the influence of alcohol to a degree which renders the person incapable of safe driving."

The blatant error of the conclusion by the Pennsylvania Superior Court that trial counsel's "apparent impropriety" is not prejudice because Petitioner "admitted to the consumption of alcohol prior to his stop" is corroborated when the text of the actual statute is reviewed. 75 Pa. C.S.A. 3731 § (a) (1) does not make it a crime to consume alcohol and then drive. 75 Pa. C.S.A. 3731 § (a) (1) only makes it a crime to operate a motor vehicle "While under the influence of alcohol to a degree which renders the person incapable of safe driving."

The Pennsylvania courts did not dare proclaim that the Petitioner was "under the influence of alcohol to a degree which render[ed him] incapable of safe driving." Instead, the Pennsylvania courts declared that the Petitioner had consumed alcohol "prior to his stop." The leap from consumption of alcohol "prior to his stop" to "incapable of safe driving" appears to have been greater than the Pennsylvania courts felt comfortable in making.

Since all the Pennsylvania courts can find to deny the obvious prejudice done to the Petitioner is the fact that he admits he consumed alcohol "prior to his stop", their argument that trial counsel's error is not prejudice is unpersuasive.

The argument is so unpersuasive and such a superficial analysis that it is not a stretch to suggest that the Pennsylvania courts may have also found no prejudice in the "apparent impropriety" simply because the Petitioner admitted he was driving that night, or that he admitted he was in Venango

County that night, or that he admitted he was the person stopped by the police that night.

No confidence can be had in this jury verdict if the best argument the Pennsylvania courts can offer against the prejudicial effects of the repeated introduction of the Petitioner's prior bad acts is that he admitted he consumed alcohol "prior to his stop."

The position of the Pennsylvania courts is unconvincing when only one (1) paragraph is offered to dismiss trial counsel's error and the prejudice the Petitioner suffered as a result.

Denying that the Petitioner was prejudiced by trial counsel's error is an unsupportable position. A single paragraph addressing this prong of the ineffective assistance of counsel test will not suffice any reasonable expectation of genuine judicial scrutiny.

The Petitioner was prejudiced by trial counsel's actions. A new and fair trial must be ordered to remedy this clear injustice.

CONCLUSION

For the foregoing reasons and in the interest of justice the petition for a writ of certiorari should be granted.

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Counsel for Petitioner

APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 766 WAL 2000

[Filed April 17, 2001]

COMMONWEALTH OF PENNSYLVANIA, Respondent,	)
v.	)
DANA EDWARD SWAB, Petitioner	)

Petition for Allowance of Appeal
from Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 17th day of April, 2001, the Petition for Allowance of Appeal is denied.

A True Copy Patricia Honard
As of April 17, 2001
Attest: /s/_____
Chief Clerk
Supreme Court of Pennsylvania

APPENDIX B

THE SUPERIOR COURT OF PENNSYLVANIA
OFFICE OF THE PROTHONOTARY
1018 Grant Building
Pittsburgh, Pennsylvania 15219

David A. Szewczak, Esquire
Prothonotary

Eleanor R. Valecko
Deputy Prothonotary

(412) 586-7592
Website: www.superior.court.state.pa.us

November 14, 2000

Michael R. Hadley, Esquire
One Drake Drive
Oil City, PA 16301

In Re: COMMONWEALTH OF PENNSYLVANIA -v-
DANA EDWARD SWAB, Appellant
No. 278 W.D.A. 1999

Dear Mr. Hadley:

The Court has entered the following Order on the Application For Reargurnent, filed by appellant in reference to the above-captioned matter:

"ORDER OF COURT

The Court hereby DENIES the application filed September 15, 2000, requesting reargument or reconsideration of the decision dated September 1, 2000.

November 14, 2000

PER CURIAM"

Very truly yours,

/s/_____
Eleanor R. Valecko
Deputy Prothonotary

ERV/tdt
Cc: Marie T. Veon, Esquire
Honorable H. William White

APPENDIX C

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 278 WDA 1999

[Filed September 1, 2000]

COMMONWEALTH OF PENNSYLVANIA, Appellee,	)
v.	)
DANA EDWARD SWAB, Appellant.	)

Appeal from the Judgment of Sentence dated January 28, 1999 In the Court of Common Pleas of Venango County Criminal Division at No. CR NO. 751-1998

BEFORE: CAVANAUGH, EAKIN and JOYCE, JJ.
Filed Sep 1, 2000

MEMORANDUM:

Appellant, Dana Edward Swab, appeals from the judgment of sentence entered following his conviction for

driving under the influence of alcohol.[1] For the reasons set forth below, we affirm. The relevant facts and procedural history of this case are as follows.

At approximately 1:00 a.m., on June 20, 1998, Officers Anundson and Baughman observed Appellant's vehicle repeatedly cross the double yellow dividing line towards the oncoming traffic lane. The officers trailed Appellant's vehicle for about a mile, observing the vehicle repeatedly cross the double yellow line and weaving back and forth within the designated lane of travel. Officer Anundson eventually activated the emergency lights on his vehicle in an effort to stop Appellant's vehicle. Appellant proceeded for a distance and eventually came to a stop.

The officers proceeded to request identification papers. At that time, the officers smelled the odor of alcohol on Appellant's breath. Upon questioning, Appellant admitted that he had been drinking at the Tally Ho restaurant and bar. Officer Anundson next proceeded to request that Appellant exit his vehicle. Appellant staggered out of the vehicle, almost falling to the ground. Appellant failed each of the field sobriety tests administered. The Officers then placed Appellant under arrest and transported him to the hospital so that a blood sample could be drawn to determine his blood alcohol content. Despite the Officers' warning that a refusal would result in suspension of his driver's license, Appellant refused to submit to a blood test before speaking to his parole officer.

At the December 17, 1998 jury trial, Appellant was convicted of the instant offense. On January 28, 1999, the

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[1] 75 Pa.C.S.A. § 3731(a)(1).

trial court sentenced Appellant to four (4) to twenty-four months less one (1) day imprisonment. This timely appeal followed.

The sole issue raised for our review is whether trial counsel was ineffective for failing to object to repeated references to his parole.

> The threshold Inquiry in effectiveness of counsel claims is whether the Issue/argument/tactic which counsel has foregone and which forms the basis for the assertion of ineffectiveness is of arguable merit; for counsel cannot be ineffective for falling to assert a meritless claim. Once this threshold is met[,] we apply the reasonable basis test to determine whether counsel's chosen course was designed to effectuate his client's interests. If we conclude that the particular course chosen by counsel had some reasonable basis, our inquiry ceases and counsel's assistance is deemed effective. If we determine that there was no reasonable basis for counsel's chosen course[,] then the accused must demonstrate that counsel's ineffectiveness worked to his prejudice. The burden of establishing counsel's ineffectiveness is on the [defendant] because counsel's stewardship of the trial is presumptively effective.

Commonwealth v. Wilson, 543 Pa. 429, 440, 672 A.2d 293, 298 (1996), *cert. denied,* 5:19 U.S. 951, 117 S.Ct. 364, 136 L. Ed.2d 255 (1996) (citation and quotation marks omitted).

Appellant argues that trial counsel was ineffective by failing to object to the Officers' testimony that Appellant asked to speak to his parole officer before submitting a blood sample.

> Due to its prejudicial impact, evidence indicating that the defendant has previously been convicted of other crimes generally is not admissible, especially when offered to prove the character of the defendant or action in conformity with that character. However, evidence of other crimes may be admissible when the need for such evidence outweighs its prejudicial effects, such a when offered to prove motive, intent, absence of mistake, common plan or scheme, or the identity of the person accused.

Commonwealth v. Moore, 715 A.2d 448, 451 (Pa. Super. 1998).

The Commonwealth has not argued that Appellant's criminal history falls into any of the delineated exceptions relating to other crime evidence. Therefore, we must find that Appellant's claim has merit. Despite the Commonwealth's claim that the evidence was introduced to explain the course of events relating to the refusal to submit to a blood test, the testimony could have been redacted so that reference to Appellant's parole status would not have been elicited.

Furthermore, it is clear from the record that the admission of testimony pertaining to Appellant's request to speak to his parole officer was not a necessary part of the Commonwealth's case. Despite this apparent impropriety, any error in its admission would be deemed harmless.

> It is settled that an error is harmless where the properly admitted evidence is so overwhelming and where the prejudicial impact of the error is so slight that it can be concluded beyond a reasonable doubt that the error could not have contributed to the verdict. The harmless error doctrine reflects a fundamental principle which we think is particularly apt here, i.e., "that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the fundamental fairness of trial rather than on the virtually inevitable presence of immaterial error." If this court can conclude beyond a reasonable doubt that the error complained of did not contribute to the verdict, no new trial is warranted.

Commonwealth v. Weisman, 584 A.2d 980, 985 (Pa, Super. 1990), *appeal denied,* 528 Pa. 644, 600 A.2d 195 (1991) (citations omitted).

In this case, the testimony overwhelmingly reflected Appellant's guilt of driving under the influence of alcohol. Appellant himself admitted to the consumption of alcohol prior to his stop. N.T., 12/17/98, at 102. Therefore, even after assigning error in counsel's failure to object to the admission of the portion of the officers' testimony pertaining to Appellant's parole status, any error could not have contributed to the verdict. Therefore, counsel cannot be deemed ineffective. Finding no basis upon which to disturb the findings of the trial court, we affirm.

Judgment of sentence **affirmed**.

Judgment Entered:

/s/_____
Eleanor R. Valecko
Deputy Prothonotary
Date: Sep 1, 1000

APPENDIX D

IN THE COURT OF COMMON PLEAS OF VENANGO COUNTY, PENNSYLVANIA

[Filed 9/30/99]

C.R. No. 751-1998

COMMONWEALTH OF PENNSYLVANIA	)
	)
v.	)
	)
DANA SWAB, Defendant	)

Opinion in Support of Order

Defendant, Dana Swab, has appealed to the Superior Court of Pennsylvania from our sentence order announced in open court on January 28, 1999. Defendant obtained new counsel between trial and sentencing. After filing the appeal, new counsel responded to an Order by filing Concise Statement of Matters Complained of on Appeal. In response to the Concise Statement, pursuant to Pa.R.A.P. No. 1925(a), this Court will state the reasons for the Order complained of in this appeal.

We would first like to note that the Comments to Pa.R.Crim. P. §1410 state that the appellant should ask for an

evidentiary hearing and not file a direct appeal on the issue of ineffective assistance of counsel. No hearing was requested so the trial record is the only record available to respond to the Concise Statement filed by new counsel. We would also like to note that the Concise Statement is vague so we had difficulty in understanding some of the issues raised.

Regarding the issues raised in the Defendant's Statement of Matters Complained of on Appeal we will address them seriatim:

1. Briefly stated, the elements necessary to sustain a conviction for Driving Under the Influence (75 Pa.C.S.A.§3731(a) (1)) are: 1) was the Defendant operating a motor vehicle on a public way when and where alleged, and 2) was he incapable of safe operation due to voluntarily imbibing alcohol?

The standard for sufficiency of the evidence is well settled.

> [W]hether, viewing all of the evidence admitted at trial, together with all reasonable inferences therefrom, in the light most favorable to the Commonwealth, the trier of fact could have found that each element of the offenses charged could have found that each element of the offense charged was supported by evidence and inferences sufficient in law to prove guilt beyond a reasonable doubt.

Commonwealth v. Jackson, 506 Pa. 469, 471, 485 A.2d 1102, 1103 (1984).

Officers Baughman and Anundson of the Franklin Police Department were called out on a separate matter. When they had cleared that incident, Officer Baughman noticed the Defendant's vehicle approaching them; they were parallel parked on the side of the street. Officer Anundson noticed the vehicle crossed the double yellow line and decided to follow the vehicle. They noticed the vehicle was being operated erratically: swerving back and forth and crossing the white fog line several times on a straight section of road. At this time, they decided to stop the vehicle.

During the stop, the officer noted a strong odor of alcohol on the Defendant's breath. The officer asked him if he had anything to drink and he replied that he had. The Defendant agreed to submit to field sobriety tests. The officers administered three (3) field sobriety tests and the Defendant failed all three. At this point, the officers arrested the Defendant. They took him to Northwest Medical Center to take a blood test, however, the Defendant would not submit to one without first talking to his parole officer. His parole officer was not available so he continued to refuse. The officer read him the refusal form warnings (standard Section 1547 form for chemical test warnings) of the consequences of refusing to submit to the test. The Defendant continued to refuse.

The information alleged that the Defendant did unlawfully operate a motor vehicle on a public street while under the influence of alcohol to a degree that rendered him incapable of safe driving and that Defendant did unlawfully drive the vehicle in careless disregard for the safety of people and property. At the jury trial, the Defendant was convicted. The jury clearly believed the officer's version of the events over the Defendant's version.

The police officers' testimony was sufficient to find the Defendant guilty of Driving Under the Influence (75 Pa.C.S.A. §3731). Officer Anundson's testimony, standing alone, covers the elements. This claim is without merit.

2. Because no ineffectiveness hearing was held, the trial court did not hear the previous defense counsel's rationale for trial tactics so we are, in effect, unable to respond to the issue related in the Concise Statement. The standard for ineffective assistance of counsel is: "(1) the claim is of arguable merit; (2) counsel had no reasonable strategic basis for his or her inaction; and (3) that, but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different." *Commonwealth v. Kimball,* 555 Pa. 299, ---, 724 A.2d 326, 333 (1999). On the record, the claim is without merit.

2. A. and 2. B. We do not know the rationale behind new defense counsel's contentions, however, we do not see how the Defendant was prejudiced nor did we see anything at trial that would lead us to believe the Defendant was prejudiced. Certainly, nothing was raised through trial that gave this judge the opportunity to cure any problem arising from discovery.

2.C. Defense counsel specifically asked the Defendant about the grade of the road where the Field Sobriety Tests were conducted. (Tr. at 119, lines 15-25.)

1 D. There is no record of the improper remarks in the closing and new Defense counsel gives no indication what they were. In addition, we do not see how the Defendant was prejudiced nor did we see anything at trial that would lead us to believe the Defendant was prejudiced.

Regarding the issues raised in the Defendant's Supplemental Statement of Matters Complained of on Appeal:

1. A. At least once the Defendant, himself, brought up the topic of having a parole officer. (Tr. at 124, lines 1-2.)

1. B. The line of questioning by the Prosecutor did not shift the burden of proof. That line of questions, as we construed it, was to challenge the Defendant's stated reasons for refusing the Blood alcohol test. These questions were, in our opinion, salient and productive cross examination by the Commonwealth. It had nothing to do with shifting the burden of proof. The jury was instructed several times that the burden of proof was on the commonwealth, we first described this concept to them in our preliminary charge (see Tr. at 5, lines 15-23; at 6, lines 17-24; at 7, lines 17-18) and at least once in our final charge which has not been transcribed.

BY THE COURT,

/s/_____
W. WILLIAM WHITE, President Judge

APPENDIX E

IN THE COURT OF COMMON PLEAS OF VENANGO COUNTY, PENNSYLVANIA

Criminal Division
C.R. No. 751 - 1998

[Filed January 28, 1999]

COMMONWEALTH OF PENNSYLVANIA	)
	)
v.	)
	)
DANA SWAB, Defendant.	)
	)

SENTENCE

CHARGE: DRIVING UNDER THE INFLUENCE

Third Offense

AND NOW, JANUARY 28, 1999, the Sentence and Order of Court is that you, **DANA SWAB**, defendant, pay a fine of $700.00, pay the costs of prosecution and all other costs, pay for any damages done, and undergo an imprisonment in the VENANGO COUNTY JAIL for and

during the period of not less than **FOUR (4) MONTHS** and not more than **TWENTY-FOUR (24) MONTHS LESS ONE (1) DAY,** to be computed from January 28, 1999, there to be kept, fed, clothed and treated as the law directs, and stud committed to the custody of the Warden sentence may be carried into execution.

Fine and costs are payable immediately unless the time for payment is extended by the Collections Coordinator.

In the event you fully pay the fine, costs, and any restitution, and otherwise are then in compliance with the terms of any Parole Order then outstanding within ninety (90) days from today, the fine hereby imposed shall be remitted to $400.00. While in jail, Defendant will be required to reimburse the County of Venango any health care provider charges paid for Defendant.

Defendant shall be released from jail to attend the duties of his employment, not to exceed six (6) days per week, and to attend such counseling sessions as deemed necessary by the Venango County TASC.

Credit shall be allowed for -- days previously served in the Venango County Jail.

The Sentence imposed herein is in the aggravated range since the defendant was on parole for DUI at the time of this offense and this offense is, in fact, a 4th offense.

BY THE COURT,

/s/_____
H. WILLIAM WHITE, President Judge